Who Rules the Rulings?
Disputant Strength and Legal Preparedness
in World Trade Organization Dispute Settlement Proceedings

Taylor Todd
Department of Political Science
Oklahoma State University
201 Murray Hall
Stillwater, OK 74075

Holley E. Hansen
Department of Political Science
Oklahoma State University
201 Murray Hall
Stillwater, OK 74075
holley.hansen@gmail.com

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Abstract

The World Trade Organization's Dispute Settlement Body (DSB) offers member states a legal mechanism by which they can arbitrate trade disputes. The DSB has the potential to promote equality and justice in the international trade system, yet critics have raised concerns about potential biases that may undermine the legitimacy of this institution. We argue that while member state's power and global influence shape the early stages of the proceedings due to information asymmetries in bargaining, rulings are determined by factors that strengthen the legal argument of either side. In particular, we hypothesize that cases involving more wealthy countries are may be more likely to reach the panel stage of proceedings, but the panel is less likely to rule in favor of member states that present overly elaborate legal arguments. Using the WTO Dispute Settlement Data Set (Hoekman et al. 2016), we construct a dyadic dataset of all WTO consultations from 1995-2012 and analyze the factors that determine whether cases reach the panel stage of settlement proceedings and, once at this stage, what determines whether the DSB rules in favor of the primary complainant or the defendant (or respondent).

Introduction

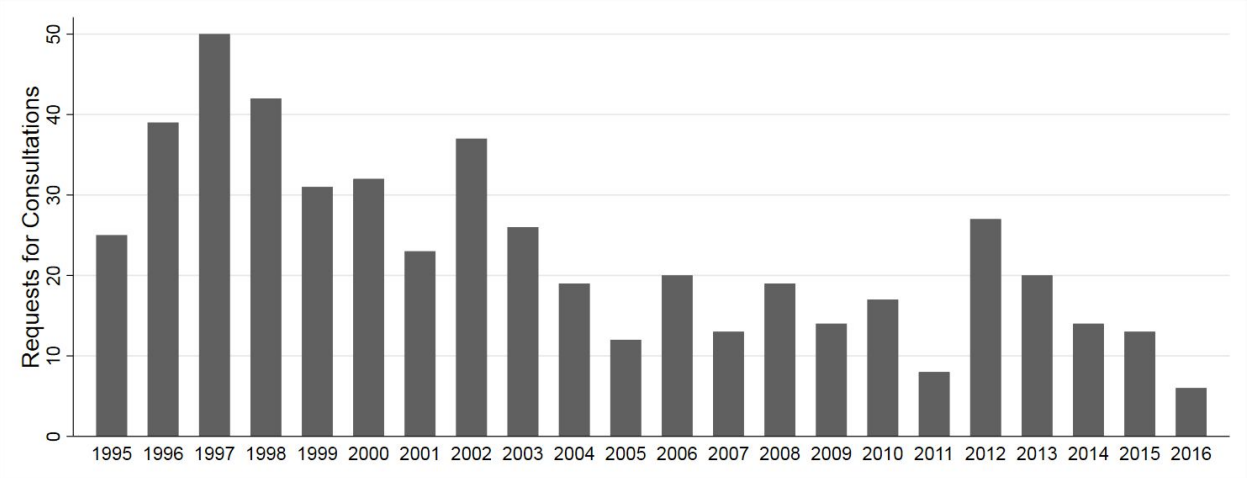
Over the last several years, the credibility of the World Trade Organization (WTO) has been called into question. Its meetings have experienced diminished productivity, leading at least one trade expert to lament the "vanishing WTO" and its relegation to becoming a "talking shop" for international trade (Milner 2005; Levinson 2009). Given its other criticisms, being labelled as ineffective is almost an improvement for the organization; anti-globalization forces have long accused the body of being a tool used by wealthy countries to dominate developing countries. This view was well summarized in Stiglitz's (2002) *Globalization and Its Discontents*, where he accuses the three major international financial institutions - the IMF, WTO, and World Bank - of pursuing unsound economic strategy with the consequence of detrimental to economic growth in developing countries. Other authors have gone so far as to accuse the organization of being an instrument of neocolonialist policymaking (Khan 2007).

On the other side of the political spectrum, the WTO has faced recent criticism by US President Donald Trump, who has asserted that the WTO has "been a disaster for" and has been "very unfair" towards the United States (Isidore 2018). This administration has even gone so far as to block judicial appointments to the organization's appellate body (Chandran and Soong 2018), and has unilaterally instituted "retaliatory" tariffs against China. This is a clear reversal of long-standing norms in global and US politics to first adjudicate trade disputes through the WTO's Dispute Settlement Body. While criticisms around the policies advocated by the WTO are long established, it is important to note that Trump's criticisms revolve around the dispute settlement mechanism of the WTO, a process that most international trade experts - even those critical of the institution - have generally viewed as an important tool allowing countries to

peacefully resolve trade disputes (Goodman 2018). Academics and former government officials worry that the departure from traditional trade policy and the potential of these actions to damage multilateral trade relations, which will possibly usher in a new era of protectionism (Paletta and Swanson 2017).

Given past criticisms, and in light of the recent shift in US trade policy, it is important to examine whether there is justification for these accusations of institutional bias in the WTO. In particular, the credibility and continued relevance of the WTO's Dispute Settlement Body (DSB), the organization's main instrument of member state mediation and adjudication, rests on an international acceptance that this organization addresses disputes in a fair manner. In fact, foreign policy experts have noted the declining relevance of the organization in recent years (Levinson 2009). As shown in our data (see Figure 1), the number of requests for WTO consultations in trade disputes has declined since the 1990s, as countries are increasingly turning to regional trade organizations, bilateral agreements, or small group meetings to resolve trade disputes (Levinson 2009). While the rise in international trade organizations is not necessarily a negative as a whole, the decision to bypass the organization undermines the WTO's ability to serve as a legal and normative promoter of international trade and economic integration.

Figure 1: Requests for WTO Consultations Per Year



Beyond its practical policy importance, we would also contend that our research is also an important theoretical expansion of the existing conflict mediation literature. Most past research on adjudication by international organizations focuses on why some states choose to accept the jurisdiction of an international court (Mitchell and Powell 2011; Johns 2012), the conditions that lead member states to choose to use an IO for arbitration (Simmons 2002), and whether or not the involvement of an international organization leads to a more successful mediation (Hansen et al. 2008). Less work has been done on actually analyzing the rulings made and the decision-making calculation of binding dispute settlement bodies such as the WTO's DSB or the European Union's Court of Justice , with most past work either focusing on basic overviews of broad trends (Tridimas and Gari 2010) or only offering the most basic comparisons of adjudication winners and losers (Malawer 2014). In addition, most of this past research has focused on IO mediation in interstate or intrastate conflict, with considerably less work examining non-militarized disputes like those focusing on trade.

In this paper, we examine all WTO DSB consultations from 1995 (when the organization transitioned from the GATT to the WTO) until 2012. We begin at the consultation stage - when a WTO member state files their first official complaint that another member has violated trade laws - through the process until the official panel (adjudication) stage and the panel's final ruling. We employ a Heckman selection model in our analysis, which allows us to test the factors that determine whether the complainant or the respondent wins a WTO panel case. This model controls for the reality that these factors may be dependent in part on the process that determines whether or not each consultation exits the mediation stage and reaches panel stage. This, we contend, allows us to better examine whether there is any evidence of powerful state bias (including evidence of bias for or against the United States), or whether the strength of a legal argument plays a larger role in determining the rulings of the WTO's Dispute Settlement Body.

The WTO's DSB: A Mechanism of Mediation and Adjudication

The WTO's DSB arose from Article XXIII of the 1994 General Agreement on Tariffs and Trade (GATT) Treaty, the document that significantly restructured the organization and led to its transformation to the WTO. The process was further developed in the "Understanding on Rules and Procedures Governing the Settlement of Disputes," better known as the Dispute Settlement Understanding.[1] While the GATT had a pre-existing system of dispute settlement, the general consensus was the procedure was ineffective and inefficient, leading to reforms that better specified the process and timeline of proceedings (Busch and Reinhardt 2003). Furthermore, the Understanding strengthened the ability of the DSB to assess compensation and

[1] https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm

legitimize retaliation against member states who fail to address trade violations within a "reasonable period" of time, thereby strengthening the potential enforcement mechanisms of this organization.

The DSB process begins when one WTO member state (the complainant) files a request for the WTO to consider possible free trade violations committed by another member state (the respondent).[2] In the initial stage (detailed in Article 5 of the Understanding), the WTO purely acts as a mediator between the disputants. In the first 60 days of a dispute, the WTO offers "good offices, conciliation and mediation" upon the request of any party in a dispute. At this stage, any WTO member can request to join the case as an "interested third party." If this request is approved, these new states join in the informal discussions, but are not officially assigned to either side of the dispute. These states are allowed to file briefs, analogous to an *amicus curiae* brief in the American legal system,[3] and, if the case continues through the WTO legal system, are entitled to receive all information about the proceedings during the panel and appeals stage. All discussions at this stage are closed, solely limited to the disputants themselves and any WTO members participating as third parties in the proceedings. These states acting in *amicus curiae* capacity are the only actors besides the disputants allowed access to the proceedings, which has led to criticisms over the lack of transparency during the mediation process (Charnovitz 2004). The Dispute Settlement Understanding emphasizes this closed nature as important in ensuring the confidentiality of negotiations to help maintain the integrity of proceedings.[4]

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[2] It is important to note that the WTO consultation proceedings is solely the purview of states; corporations are increasingly involved in cases, but states act as gatekeepers.

[3] Translated as "friend of the court," the *amicus curiae* brief allows a participant to offer information to the court bearing to the case at hand, but without becoming an official party to the dispute.

[4] See the "Rules of conduct for the understanding on rules and procedures governing the settlement of disputes," WT/DSB/RC/1, 11 December 1996. Retrieved from https://www.wto.org/english/tratop_e/dispu_e/rc_e.htm (12 May 2016).

After the initial consultation is filed, the disputants, according to WTO rules, have 60 days to reach an acceptable settlement on their own through the good offices, conciliation and mediation process. If an agreement cannot be reached, the complainant(s) initiate a request to continue on to the panel stage, which is where the WTO enters its official adjudication role. According to the WTO's description of the process within 45 days, a panel of three judges is assigned to the case[5]. As stated in Article 8 of the understanding, panel members "should be selected with a view to ensuring the independence of the members" (para. 2); to help with the selection, the WTO Secretariat does maintain a list of qualified individuals who might be eligible for panel selection (para. 3). The parties in the dispute may appoint their own panel through mutual agreement, but if no agreement is reached within 20 days, the WTO Director-General may appoint the panel members. The panel plays both an investigative role into the case, but also serves as an adjudicator, as they are expected to deliver an objective assessment on whether the respondent violated a relevant trade agreement. Like the consultation stage, the panel deliberations are confidential, and the panel is meant to draft their final report "without the presence of the parties to the dispute" (Article 14, para. 2).

The officially WTO allots up to 6 months from the time a panel is formed until a decision is reached; at this time, the judges examine all the different issues listed as part of a complaint and rule separately on each issue either in favor of the complainant(s), in favor of the respondent,

[5] https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm

or refusing to decide on a claim with a decision of "judicial economy[6]." The DSB determines whether to officially adopt the panel's decision on the matters in the case; if it is adopted, the decision is considered binding to member states, though they do have the option to pursue an appeal. Once a panel decision is adopted, it is circulated to the WTO members unless one of the parties to the dispute has submitted a request to appeal the decision. Appeals can be made to the standing Appellate Body of the DSB; countries that lose their appeals are expected to abide by the rulings of the panel. Those violators that do not resolve the trade issue within a reasonable amount of time may be responsible for compensation, though this is voluntary (Article 22, para. 1).

Examining the basic process of the WTO dispute settlement proceedings, it is obvious that the process includes two distinct yet interconnected conflict management tactics. During the consultation stage, the WTO offers what Rauchhaus (2006) classifies as one of the "lightest" forms of mediation: offering good offices. Only when this light mediation fails does the dispute enter into the "heavy" mediation phase of panel adjudication. In essence, this means that the process that leads to a panel decision represents two separate failures of international cooperation - the failure of countries to resolve the issue bilaterally, and the failure of the two sides to reach an agreement in a situation where a third party is serving as an additional information provider and enforcement coordinator (Johns and Rosendorff 2009; Johns 2012). This means that when theorizing about WTO proceedings, we need to view the process as a two-stage bargaining game. This approach coincides with more rationalist explanations for international organization formation and behavior, which view international organizations and law as the result of

[6] Judicial Economy denotes the decision to not rule on a certain issue if that issue does not affect the outcome of the case or is not necessary to consider in light of the previous decisions; it is called judicial economy on account that many legal systems are overloaded, thus resources are scarce in a legal system.

coordination games carried out by member states operating under conditions of issue uncertainty (Koremenos et al. 2001; Guzman 2005).

Mediation as a Bargaining Game: Explaining Success and Failure

Building off a basic bargaining model of war (Fearon 1995; Reiter 2003), conflict between two states is best thought as a negotiation between two rational states competing over scarce resources. To secure the best deal possible for themselves, countries have incentives to exaggerate and misrepresent their preferences, effectively narrowing the range of acceptable bargains into non-existence. Uncertainty, commitment problems, and the indivisibility of the resource at stake can escalate disputes into full-scale conflicts (Fearon 1995), particularly when the issue is highly salient to one or both of the states in the dispute (Diehl 1992). Considerable work has traced how international organizations can benefit state negotiations by reducing uncertainty and resolving commitment issues.[7]

A number of factors, however, may impact the ability of an international organization to successfully bridge the bargaining gap between countries. Past work on international third party conflict management often groups those factors into supply-side and demand-side factors. Supply-side explanations examine the availability and characteristics of mediators or the terms of the negotiation proceedings that may impact their effectiveness (Simmons 2002; Crescenzi et al. 2011). Demand-side explanations, in contrast, examine the conditions leading disputants to seek deout mediators, including the conditions that make it more difficult for disputants to reach agreements, such as perceived bias, mediator credibility, joint democracy, and whether or not

[7] Beyond the classic work by Keohane (1984) and Abbott and Snidal (1998), a more recent example includes Best (2012)

there is repeated play by the mediator. In building our theory, we draw more heavily from the demand-side explanations.[8]

The Severity of the Conflict and The Salience of the Issues

Scholars argue that, for states to chose to enter into a mediation or arbitration process, a conflict will often be non-vital, contentious, and temporary in nature (Bilder 1983; Bercovitch 1986; Crescenzi et al 2011). Bilder (1983) suggests that states only enter non-vital conflicts into adjudication as a sign of goodwill and openness to resolution, in essence signaling that they are suffering from the continuation of conflict and need the issue resolved (Fearon 1995). An issue is considered to have tangible salience if it is related to security and wealth, and an issue is considered to have intangible salience if it involves factors such as justice or influence (Hensel et al 2008; Daniels and Mitchell 2017).

WTO cases tend to involve all four of these factors for both the complainant and the respondent, on account of their economic nature and being a part of a largely democratic organization. Busch and Reinhardt (2003, 721) note that the post-1994 reforms to the Dispute Settlement Understanding prevent powerful states from using their influence to delay or block the creation of panel proceedings, meaning that legal preparation carries significant weight during pre-panel discussions. If an issue is salient, there would be incentive for a rational actor to come to negotiations more prepared and devote more resources to the issue. Because of this, we assume that complainants who come prepared with a longer list of trade violations in their original consulting document see the issue under dispute as more salient, *and* that they have dedicated more resource to preparing their legal arguments. Therefore, we expect:

[8] The WTO is facing increased competition from regional organizations in handling trade disputes (McBride 2018); while this supply-side factor likely plays a role in determining the cases that are brought up in consultations, this interaction is beyond the scope of our current study.

Hypothesis 1: *WTO trade disputes are more likely to end in the consultation stage when the original consultation request includes a longer list of trade violations.*

When moving from mediation to adjudication in the panel stage, there are good reasons to suspect that the strength of the legal argument will prove even more significant than disputant characteristics in determining panel rulings (Busch and Reinhardt 2003). However, there is a trend in legal arguments that if they pass a certain point of being strong, they tend to both become weaker and discourage settlement. The idea comes from the tendency of legal counsel to stretch put complaints that may be only partially true or not at all true into the filings. This effective "bluff" is likely to backfire for two reasons: it greatly reduces the visibility of state preferences in negotiations and rational actors will not settle over violations that are unfounded (cite). For this reason, we expect that:

Hypothesis 2: *Panel members are less likely to rule in favor of the complainant when the panel request includes a longer list of trade violations.*

Economic Power and the Issue of Information Asymmetries

One of the most important role of IO mediators is to help reduce information asymmetries and participation costs for members (Fearon 1995; Guzman 2005). In regards to the WTO, even the the DSB process is confidential to outsiders, the involvement of good offices and the in-depth panel hearings do provide both sides in a dispute important information that would be absent in a pure bilateral negotiation. However, the incentive for states to misrepresent may not be fully resolved by the DSB proceedings, especially given the potential benefits to states in allowing them to move the terms of the negotiations closer to their ideal point (Fearon 1995).

States that are especially powerful vis-a-vis their opponent may be more likely to be able to control the flow of information over a dispute, especially when an IO mediator takes a more passive role such as they would in a "good offices" mediation. Power asymmetry has been linked to information asymmetry issues, thereby reducing the chance of successful mediation (Rauchhaus 2006; Daniels and Mitchell 2017). Applying this to the DSB setting, we would expect that power asymmetries may lead to greater information asymmetries during the initial request for consultations, leading to or prediction that:

> Hypothesis 3: *WTO trade disputes are more likely to move on to the panel stage in situations of power asymmetry.*

However, given that the panel judges play a more active role in investigations during the arbitration stage, we do not expect that power asymmetries nor parity will play any significant role in shaping the actual ruling.

Shared Democracy and the Benefits to Settlement During "Good Offices"

Finally, while power asymmetries may make it more difficult for member states to successfully negotiate a trade dispute bargaining range during the "good offices" stage of DSB proceedings, we would expect that shared democracy may widen the negotiation range. Credible commitments are easier to form if a dyad is formed of two states with similar governments; as past work has shown that joint democracy and joint autocracies are more likely to form agreements than mixed dyads (Leeds 1999; Weeks 2008). While some autocracies may be able to overcome their traditional credible commitment problems (Weeks 2008), democratic leaders often suffer higher costs of breaking agreements than autocratic leaders do are not subject to (Leeds 1999). Democratic states in particular are constrained by stronger institutions, providing

multiple mechanisms by which the public may hold their leaders accountable to foreign policy decisions (Leeds 1999).

A dyad of two democracies, therefore, will have an inherent advantage in successfully navigating a negotiation bargaining game. Democracies are more likely to enter mediation and adhere to the decisions made because their domestic norms extend into their navigation of the international system, and they have higher degrees of economic interaction which makes them more prone to disputes in the first place (Maoz and Russett 1993; Dixon 1994; Simmons 1999; Mitchell et al 2008; Daniels and Mitchell 2017). The greater value placed on contract adherence within democracies (characterized in part by a strong rule of law) allows for them to be seen as more credible in their commitments made in these negotiations, which gives them a further advantage than simply being held accountable for their policy decisions by the electorate (Mitchell et al. 2008; Leeds 1999). Additionally, these democratic norms are built into the international system by wealthy democracies, such as the United States, which found IOs and built the charters using their own norms. Resulting from shared values and norms, Mitchell et al. (2008) finds that jointly democratic dyads with high shared IO membership are more likely to reach settlements in "good offices" proceedings because shared membership is a signal for preference similarity. For this reason, we hypothesize that:

> Hypothesis 4: *WTO trade disputes are more likely to end in the consultation stage in situations in which both disputants are democracies..*

However, it is important to note that the more shared IO memberships two states have, the more likely they are to involve a third-party in the first place (Hansen et al. 2008). We recognize that

this could have a significant selection effect in the WTO, which has numerous members and a large portion of democracies.

Methodology

The basis for our dataset is the WTO Dispute Settlement Database (WTO-DSB) from the Global Governance Programme (Johannesson and Mavroidis 2016). This dataset includes information on the full 507 requests for consultation put before the WTO's DSB between January 1995 and May 2016. This dataset summarizes data on each consultation request as it moves from the consultation stage to the panel stage, to the appellate body, and finally to implementation and suspension of concessions for each complaint. In our research, we are only focusing on the first two stages: consultation (e.g. whether or not a panel is established) and panel ruling. Our unit of analysis is the individual consultation, as identified by a separate Dispute Settlement (henceforth, DSno.) number (aka case number).[9]

Dependent Variables

Using the WTO-DSB, we create two dependent variables. Beginning with the consultation stage, we first code each case as a simple dichotomous variable, coded as 1 if a consultation *request moves on to the panel stage* and 0 if the case was settled by the complainant(s) and respondent during the "good offices" stage of the consultation. It is important that we note that we treat each WTO consultation as if it is a dyadic relationship, even though there are two main features of WTO Dispute Settlements proceedings that may undermine that logic. First, the European Union operates as one entity within the WTO,

[9] The WTO Dispute Settlement Body *can* examine and rule on multiple consultations in one panel, and does, in fact, join 99 of the consultations into panel groupings. However, we believe that we are justified as treating these as separate observations since it is possible for the panel to give different rulings for each consultation, even when the respondents are the same country and the issues raised in each consultation are identical.

meaning that the entire EU and not the individual EU member states, serve as complainants and respondents in cases involving this organization. Second, while an overwhelming majority of our cases include only one respondent, there are a small number of cases that include multiple complainants (see Table 1).

Table 1: Complainants per DSNumber

	Consultation Stage	Panel Stage
with only 1 complainant	501	246
with 4 complainants	2	1
with 5 complainants	2	1
with 6 complainants	1	1
with 9 complainants	1	0
Total Number of Cases	**507**	**249**

Taken together, this does suggest that some WTO Dispute Settlement proceedings may better reflect a more multilateral relationship than our current analysis accounts for. Poast (2016) provides an excellent summary of the troubles of using dyadic logic when describing relationships are a more multilateral. However, since the second potential problem only applies to a small subset of our cases, and we explore alternative measures of EU power aggregation, we do feel justified in maintaining our treatment of court cases as dyadic.[10]

Our second dependent variable measures whether the panel ruled in favor of the complainant(s) or the respondent. Some past research has coded the rulings as a dichotomous

[10] For both our power measures discussed below, we follow a very realist logic and treat the EU as being equivalent in power to its most powerful member, Germany.

variable, which essentially treats each case as if it is a clear victory or loss for either side (Turk 2011; Malawer 2014). However, WTO panels rule separately on each trade issue, meaning that the WTO rulings are a more nuanced than would be captured by a dichotomous coding. For this reason, we calculate our variable of *rulings favor complainant* by measuring the percent of trade violations cited in the creation of the panel in which the judges rule in favor of the complainant.

Given that we believe that the factors present during the consultation stage impact whether a case even moves on to the panel stage, it is necessary for us to model the selection effects of this relationship. After all, some trade disputes are more difficult to resolve, making them more likely to move on to the panel stage. Since some of the factors that determine the outcome of rulings may also shape whether a panel is created in the first place (such as we predict in hypothesis 1 and 2 regarding the number of complaints filed), if we fail to account for the initial stage, we may incorrectly estimate the actual relationship between our independent and dependent variables during the second stage (Reiter and Stam 1998). For this reason, we use a two-stage Heckman model to account for these nonrandom selection process (Heckman 1979; Reed 2000). This accounts for situations when the selection into a behavior was non-random, and therefore exhibited bias.[11] The Heckman analysis proceeds in two stages: the first is a stage determining the selection of cases into the second stage, while the second includes the parameters of the first model as additional explanatory variables when modeling the second stage. This allows us to properly capture both the determinants on the decision of the disputants of moving on to the panel stage and for whom the panel rules.

Independent Variables

[11] Heckman's original 1979 example involved calculating worker wages, the causes of which, Heckman argued, could not be properly predicted unless we first account for the probability the person would be working.

To measure the role of issue salience in a trade dispute, we create a *cited issues* variable, which is a count on the number of issues cited in each complainant filing. In their requests for consultation and panel formation, the complainants cite specific treaty articles and/or subsections as "issue" in the trade dispute. We contend that complainants that include more treaty issues in their original filing are creating a stronger legal "bluff" to try to appear as the hard bargainer. As we theorized, this strategy may actually work against complainants, as it both increases the likelihood that consultations fail and the case goes on to the panel, and increases the chance that judges in the panel stage will call the complainant's bluff and rule against the weaker cited violations. To calculate this measure, we recode the WTO-DSB (Johannesson and Mavroidis 2016) listings of the specific issues cited into a count of the number of issues cited at both the *consultation* and the *panel* stages.

To capture the role of power in shaping WTO case decisions, we include two different measures of state power and capabilities. The first is based on a classic realist definition of power, the Correlates of War Project's *Composite Indicator of National Capability (CINC)* score (Singer et al. 1972). This measure, which captures each state's demographic, industrial, and military strength,[12] is based on the percentage that a state controls of the globe's total power capabilities. Our second measure of power ,and is each state's Gross Domestic Product (GDP); this date comes from Gleditsch (2002), is purely economic, . We code each country based on their matching score during the year the request for consultations began. Notably, these variables do set an upward time limit for our dataset; while the WTO-DSB codes cases up to

[12] The official six components included in the CINC score are: total population, urban population, iron and steel production, energy consumption, military personnel, and military expenditures per state.

2016, the CINC data are only available up to 2012 and Gleditsch's trade data currently ends in 2011.

To create our *relative CINC power* and *relative GDP power* measures, we follow the norm of dyadic research and take the larger state's share of power divided by the sum of the dyadic total. Given past work highlighting the possible difficulties of state cooperation and risk of conflict in situations of power parity (Lemke and Werner 1996; Kim 2002; Daniels and Mitchell 2017), we also include a simple dichotomous *power parity* measure, coded as 1 if the two states are within 80% of one another on these scores and 0 if not.

Finally, to account for the classic democratic bargaining advantage (Dixon 1994; Ellis et al. 2010), we create a *joint democracy* variable using the *Polity2* measure from the Polity IV dataset (Marshall et al. 2014). Following the norm in the field, we code countries as democratic if they score 6 or above in this measure. After classifying the complainant and respondent as a democracy or not, we then create a simple dichotomous variable, with a 1 representing a case where both disputants are democracies and 0 representing any other regime pairing.

Control Variables

When analyzing the consultation stage in WTO disputes, it is important to consider other factors that may increase or decrease the likelihood that consultation bargaining will be a success. Given that DSB cases represent a legal negotiation, we might extend the joint democracy logic and suspect that countries who share similar legal traditions will be more likely to overcome the information problems typical of dispute bargaining and successfully negotiate an agreement during the initial consultation phase. For this reason, we use Mitchell and Powell's (2011) classification of country legal traditions to create a simple dichotomous variable, a *shared*

legal tradition, coded as 1 if the disputants share a common legal system background. At the same time, it is important to remember that the consultation phase is not completely a dyadic interaction. As mentioned earlier when describing WTO dispute proceedings, other countries are allowed to join in consultations; while they do not "choose a side" in the dispute, their participation is likely to influence mediation attempts between the disputants. More specifically, we expect that the more third-parties who join the consultation proceedings are likely to complicate the bargaining game, making an agreement less likely between the complainant and respondent. For this reason, we include a variable measuring the *number of WTO members joining consultations*.

We include two basic controls to help capture these relationships between panel judges and case outcome, both relying on a recoding of several variables from the WTO-DSB. First, *WTO members allowed to join consultations* is a basic count of the number WTO members whose request to join consultations proceedings was granted. As these additional WTO members play their most significant role during consultation meetings, we only include this variable during the first stage of our selection model (the consultation stage). Second, we create a simple dichotomous variable, *Director-General appointed panel*, coded as 1 if two or more of the panel members were appointed by the WTO's Director-General, and 0 if the disputants themselves decided on two more more of the panel members.[13]

We also include two control variables to help account for some potential cultural barriers countries may face when operating within the WTO dispute settlement system. First, based on its reliance on panels of judges and strict legal interpretations, we may best classify the WTO

[13] DSB panels include 3 members who act as judges, and while most panels are selected using the same process for all judges, there are a few cases who deviate from that pattern.

Dispute Settlement Body as operating under the norms of a civil law tradition. For this reason, we would expect that legal teams from countries that follow Common, Islamic, or Hybrid legal traditions may require more efforts to adapt their procedures than countries who are "native" civil law practitioners. Using the legal system classification used by Mitchell and Powell (2011), we create two dichotomous variables - *complainant civil law* and *respondent civil law* - which is coded as 1 if the state operates under a civil law legal system domestically and 0 if they do not.

For *language barrier*, we use the CIA World Factbook (2018) to code a simple dichotomous variable on whether the country's official language or official business language is one of the WTO's official languages.[14] Countries receive a 0 if they share an official language with the WTO, while a 1 means the state's official language(s) differs from the WTO, and thus legal team members representing that country may face the added challenge of a language barrier when arguing their cases. Again, we create two versions of this variable, *complainant language barrier* and *respondent language barrier*.

Finally, given that the US holds extraordinary power and influence in the workings of the WTO, we include a dichotomous variables if the respondent is the United States (*US respondent*).[15] The US also has extensive legal resources for the WTO's system that other states do not have. The US has legal counsel working in the Office of the United States Trade Representative that specialize in WTO representation and has used the system numerous times (USTR 2018). Additionally, large US-based law firms with thousands of lawyers like Baker McKenzie and White & Case market specialized counsel in the areas of international trade and

[14] The three official languages of the WTO are English, French, and Spanish (https://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm).

[15] We also included a similar dichotmous *EU respondent* control variable, but this variable did not significant change our analysis. Due to its lack of significance and lack of theoretical interest, we decided to simplify our model and limit just to controlling for the US as respondent.

the WTO (Baker McKenzie 2018; White & Case 2018). This allows us to test, when controlling for other relevant factors, whether the WTO really has a pro- or anti-US stance.

Results

We present the results of our Heckman analysis in Table 2; Model 1 uses our GDP measure for country economic power, while Model 2 presents the same analysis but with CINC as our power measure score as a robustness check. Starting with the consultation phase (the selection stage) in both our models, we do find support for our first hypothesis that the cases that are more likely to move on to the panel stage are the cases in which the complainant cites more issues in their initial filing. It is difficult to disentangle whether this is because more *cited issues* corresponds to greater dispute issue salience for the complainant, or whether this is an indicator of the complainant seeking to misrepresent their true bargaining area in order to gain more concessions from the respondent. Given the findings in the second stage (discussed below), we suspect that this finding actually suggests the second.

Regarding our other hypotheses for the consultation stage, we predicted that disputes between more powerful states would be more likely to move on to the consultation stage (Hypothesis 3), while those between *joint democracies* would be less likely to do so (Hypothesis 4). However, we fail to find any support for either of these two predictions. It is worth further exploring whether this departure from the broader mediation literature suggests that bilateral negotiations in trade disputes operate under different principles than other forms of conflicts.

Table 2: WTO Consultations Outcome and Panel Decisions
(Heckman Selection Model, Two-Step Estimates)

	Model 1 (GDP as power)		**Model 2** (CINC as power)	
	Selection (Panel Created)	Ruling favors Complainant	*Selection* (Panel Created)	Ruling favors Complainant
Cited Issues	.017*	-.002**	.014*	-.003**
	(.008)	(.001)	(.008)	(.001)
Relative power	1.43	-.087	.656	.291
	(.977)	(.387)	(.938)	(.372)
Power parity	.415	-.160	.366	-.010
	(.265)	(.108)	(.258)	(.108)
Joint democracy	-.250	--	-.290	--
	(.195)		(.188)	
Director-General appointed panel	--	.006	--	-.007
		(.051)		(.054)
Number of WTO members joining consultation	.085**	--	.062**	--
	(.031)		(.027)	
Shared legal system	-.001	--	.063	--
	(.138)		(.134)	
Complainant civil law	--	.011	--	.023
		(.047)		(.050)
Complainant language barrier	--	-.048	--	-.053
		(.056)		(.060)
Respondent civil law	--	-.011	--	.005
		(.063)		(.063)
Respondent language barrier	--	-.0003	--	-.009
		(.067)		(.068)
US Respondent	.606***	-.145	.642***	-.122
	(.159)	(.096)	(.156)	(.101)
Constant	-1.653*	.969**	-1.010	.601
	(.887)	(.449)	(.851)	(.427)
N	423		423	
Wald Chi-squared	13.36		9.83	
Mills Lambda	-.026 (.146)		-.018 (.166)	

* p < .10, ** p < .05, *** p < .01
Note: Numbers in parentheses are standard errors.

Turning to our control variables, we find that consultations that are joined by more WTO members as parties to the dispute are more likely to move on to the panel stage. This supports

the idea that the presence of more third-party actors in the "good offices" stage of consultation complicates the bargaining game and makes a bilateral settlement less likely. *Shared legal system*, however, does not reach significance, suggesting that having a common legal tradition to anchor negotiations may not matter in regards to trade disputes.

Finally, turning to the only only potential "power" measure to reach significance in the consultation stage, we do find that cases that include the US as a respondent are significantly more likely to move from the consultation to the panel stage. This may suggest that the US is either an especially hard bargainer in mediation (effectively shrinking the bilateral bargaining range) or the US as the effective WTO founder is especially acceptant of the DSB option. Regardless of the cause, this does suggest that countries who seek to challenge the US on trade issues before the WTO are likely to have a long, drawn out legal battle before them.

Interesting though, as we turn to the actual ruling stage, we do not find any evidence that the US is more likely to win or lose their cases than any other state. If we combine this with the lack of significance in our power measures, we note a general pattern that "power" - whether economic, military, or US hegemony - seems to play little role in determining DSB rulings. While some past critics may have argued that the WTO advantages wealthy and powerful states at the expense of poorer ones, we find no evidence of this claim. Instead, our findings suggest that the WTO is indeed serving as a neutral arbitrator and offering a "level playing field" for disputants regardless of wealth or influence.

In fact, the only variable that we do find reach significance is the *cited issues* variable, and in the direction we predict in Hypothesis 2. The negative and significant coefficient indicates that judges are less likely to completely support complainants who file a longer list

issues in their request for a panel. This does support our argument that complainants are using the initial filing request as a form of legal bluff to try to win concessions from respondents; however, as we predict, this strategy backfires. These "harder bargainers" are less likely to be able to settle out of court in the consultation stage, and see less success in winning their cases at the panel stage.

As for the controls relating to panel rulings, we find no significant relationship between any of our controls and the final direction of the rulings. Our findings do suggest that while the nature of the original complaint play a role in determining how the panel rules, factors such as who decided on the panel judges, what legal system is practiced by the complainant or the respondent, and what the complainant or respondent native language is (and whether it differs from the official WTO languages) plays little role in shaping the judge's final opinion.

Conclusion

Overall, we find that our results support the idea that bargaining theory can successfully be applied to trade disputes. We find that bargaining, its characterization of preferences and overlaps, and the escalation of conflict following the clouding of preferences, all holds true in the mediation stage of the WTO's DSB. States that bargain harder are more likely to need assistance from a panel; those states that bargain hardest, however, are less likely to attain their desired outcome once they reach arbitration. This occurs due to the incentive to cloud their true preferences during the mediation stage with overly complicated legalistic arguments, thereby provoking the responding party and weakening their position before the judges. We also find that more salient issues, measured as the number of states that join consultations, are more difficult to settle as well, which matches the predictions made from bargaining theory. In response to these

findings, we recommend in future uses of the WTO's DSB that states come prepared with only strong allegations as well as an idea of acceptable settlements. This preparedness would increase the likelihood that the case will settle, and would thus take less time and financial resources to resolve. If the issue is salient, more time and resources should be put into the case, and preference overlap may be reduced as a result of a narrowing range of acceptable outcomes.

Given the results of our Heckman model, we have three major findings: that power plays no role in the settlement of WTO disputes, there is little evidence of bias towards or against the US, and that the DSB fits the expectations of the bargaining game. Following from these conclusions, we believe that the prognosis for the WTO is positive; the institution is serving as the unbiased arbitrator it was meant to be as part of the Bretton-Woods system for the promotion of economic interdependence and peace-building. It is successfully pursuing the promotion of international trade and the resolution of trade disputes in an unbiased manner. It also serves as a great equalizer between developed and developing states. This mechanism should still be utilized by states when possible. The ushering in of protectionist policies in response to alleged inconsistencies and unfair in the execution of WTO's policy are not grounded or justified by an empirical study of the dyadic bargaining opportunities.

Stiglitz's (2002) and Khan's (2007) view of the Bretton-Woods system as an exploitative and neocolonialist tool of developed nations used against developing nations seems to be largely irrelevant in modern trade disputes, as we find that there is no evidence of a power advantage in the WTO. Interestingly, while power plays little role in determining the outcome of disputes, the number of initial complaints filed is highly significant in the consultation and ruling stage. We find that cases with an extensive list of trade violations are more likely to go to panel, but are less

likely to be ruled in the complainant's favor. This phenomena is explained by bargaining theory, which postulates that if states bargain too hard, they will cloud the other party's view of their preferences, making an agreement harder to reach. In essence, the transition from consultation and mediation to the panel stage represents a failed mediation attempt. By not being able to reach an agreement in the mediation stage and moving to the panel, the conflict is escalated, as expected in the bargaining literature.

While member states may be turning away from the "vanishing WTO" to pursue other conflict mediators, our findings suggest that the WTO remains a neutral arbitrator and a viable option for countries who do continue to work within the system. Regional organizations and bilateral agreements may have their advantages as mediators; as organizations characterized by a tighter range of norms and preferences (Hansen et al. 2008), they may help construct a simpler bargaining area for states looking to resolve trade disputes. However, this preference for a simpler venue does not undermine the legitimacy of the WTO as an international mediator and arbitrator. The Trump administration's rhetoric regarding the WTO being "a disaster" for the US is entirely unfounded; there is no bias for or against the US present in the WTO. The only significant finding for the US is that it goes to panel more often than others. We contend that this is likely a result of the US having a "perfect storm" of factors: it has the ability to prepare lengthy legal arguments, access to some of the only legal counsel in the world specializing in the WTO, has massive influence on the formation of IOs, and bargains hard in the international arena.

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